

**DECISION**



13705 PLM-1 Mr. Pool  
**THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D. C. 20548**

FILE: B-196476

DATE: May 9, 1980

MATTER OF: Frederick J. Killian - Erroneous payment  
of pay-equitable estoppel

DIGEST: Employee of Department of Defense Dependents Schools claims that Government is estopped to retroactively adjust his pay which was erroneously set at a higher rate than applicable regulations permit. Claim is denied because doctrine of equitable estoppel does not apply in cases where, as here, the relationship between the Government and the employee is not contractual, but appointive, in strict accordance with statutes and regulations. The Government is not estopped from repudiating erroneous advice or authorizations of its agents.

Dr. Frederick J. Killian, an educator employed *DLG 04614* by the Department of Defense Dependents Schools, Europe, requests reconsideration of his claim for loss of salary due to the retroactive correction of an error in his rate of pay and for the reversal of the corrective action. His claim has been disallowed by both his employing agency and our Claims Division.

When Dr. Killian's General Schedule position, Principal GS-11 at the Darmstadt Career Center, in which he was being paid at the rate for step 5, \$16,627 per annum, was abolished effective August 12, 1974, he was offered a lateral transfer to another grade GS-11 position at the Mannheim Elementary School. He was also offered the position of Teacher (Assistant Principal) Class II at the Rhein Main Junior High School. This position was paid on a school year basis under the provisions of the Defense Department Overseas Teachers Pay and Personnel Practices Act, 20 U.S.C. § 901 et seq., and the implementing regulations. Dr. Killian was told by his personnel office that he would be paid at the rate for step 15 of Class II, \$15,890 per school year, under the highest previous rate rule.

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Dr. Killian declined the grade GS-11 position, voluntarily agreed to a reduction in pay, accepted the Class II position, and was paid at the step 15 rate from August 12, 1974, to February 21, 1975. In December of 1974, however, an audit disclosed that the personnel office had failed to reduce the amount used as the highest previous rate for the school year position to 10/12ths of the highest previous rate earned in a position paid on a per annum basis as required by the governing regulation, DOD Directive 1400.13. Consequently, Dr. Killian's pay should have been set at the rate for step 9 of Class II, \$13,640 per school year. The error was corrected retroactively to August 12, 1974, on February 21, 1975, by which time he had been overpaid in the amount of \$1,500.80.

A request for waiver of the indebtedness resulting from this overpayment was initiated on May 16, 1975. On March 29, 1977, our Claims Division, finding that Dr. Killian had notice of the error in December 1974, waived recovery of that portion of the overpayment received before such notice and denied waiver of the remainder under the provisions of 5 U.S.C. 5584.

The issues with which we are primarily concerned here, however, are those raised by Dr. Killian in his grievance filed with his employing agency on March 8, 1976, in which he sought reversal of the corrective action changing his pay step from 15 to 9 and the continuance of his pay at the step 15 rate. It was his contention in substance that his decision to decline the lateral transfer to another grade GS-11 position when his position was abolished and to accept the Class II position was based solely on the erroneous information from his personnel office that he would be paid at the rate for step 15. Therefore, the Government should be estopped from retroactively reducing his pay below that amount or, in the alternative, he should be allowed to retroactively change his decision and accept the offered grade GS-11 position.

The grievance examiner concluded in substance that while Dr. Killian was misled by the erroneous salary information he was given, his decision to decline the lateral transfer to another grade GS-11 position was influenced by other considerations.

This conclusion was based in part on the fact that Dr. Killian was offered and declined another grade GS-11 position, Deputy Principal of Baumholder Dependents School, in June of 1976 while his grievance was pending. The examiner also concluded that the governing regulation, DOD Directive 1400.13, made mandatory the retroactive downward adjustment of Dr. Killian's pay and that there was no authority to modify or waive the application of that regulation. Consequently, he recommended that the grievance be denied. The deciding official adopted the examiner's recommendation and issued a final decision denying the grievance on August 31, 1976. By a Settlement Certificate issued January 5, 1979, our Claims Division concurred in the employing agency's decision and disallowed Dr. Killian's claim.

In appealing the Claims Division's disallowance Dr. Killian has reiterated his contentions that equitable considerations of his good faith detrimental reliance on his agency's erroneous pay-setting actions should preclude the retroactive adjustment and reduction of his salary, or, in the alternative, he should be permitted to retroactively change his decision and accept the grade GS-11 position first offered.

In substance Dr. Killian is arguing that the doctrine of equitable estoppel applies in his case. That is, the Government is estopped from unilaterally adjusting his salary where his service and receipt of payments during the period in question evidence an acceptance of the position as offered by the Government and thus the formation of a contract. Dr. Killian contends that where the Government unilaterally readjusts his salary in these circumstances it is breaching the contract and may be estopped from effecting such action. This argument, while not without appeal, is contrary to law.

The relationship between the Federal Government and its employees is not a simple contractual relationship. Since Federal employees are appointed and serve only in accordance with the applicable statutes and regulations, the ordinary principles of contract law

do not apply. See William J. Elder and Stephen M. Owen, 56 Comp. Gen. 85 (1976), citing Hopkins v. United States, 513 F.2d 1360 (Ct. Cl. 1975). In correcting the error in Dr. Killian's rate of pay and recovering money that was improperly paid to him the Government is enforcing a public right that is founded in law, the Defense Department Overseas Teachers Pay and Personnel Practices Act, 20 U.S.C. 901 et seq., and the implementing regulation, DOD Directive 1400.13. Further, it should be noted that waiver of an erroneous overpayment of pay pursuant to 5 U.S.C. § 5584 only serves to validate the payments waived; it does not validate or otherwise bind the Government to the erroneous personnel actions which gave rise to the payments. 49 Comp. Gen. 18 (1969).

It is unfortunate that Dr. Killian was erroneously authorized to be paid at a salary rate which exceeded his statutory and regulatory entitlement, and that he was erroneously advised by responsible agency officials concerning his pay status. However, it is well established that, as stated by the Supreme Court in Utah Power & Light Co. v. United States, 243 U.S. 389 (1917), "the United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit."

Thus we have consistently held that the Government cannot be bound beyond the actual authority conferred upon its agents by statute or by regulations, and this is so even though the agent may have been unaware of the limitations on his authority. The Government is not estopped from repudiating advice given by one of its officials if that advice is erroneous, and any payments made on the basis of such erroneous advice or authorization are recoverable. See James A. Schultz, B-195167, October 12, 1979, 59 Comp. Gen. \_\_\_\_, and cases cited therein; and William J. Elder and Stephen M. Owen, supra.

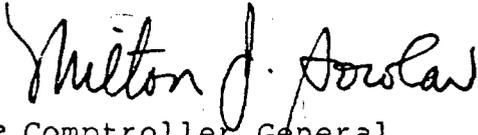
Regarding Dr. Killian's contention that he should be permitted to retroactively change his decision and accept the grade GS-11 position offered at the time his position was abolished, we note that, while his decision

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to accept the Class II position may have been influenced by the erroneous information given him, there is no indication that his appointment to that position was in any way invalid. We know of no authority for cancelling this valid appointment and appointing him to the other position retroactively, even if this were practicable. Moreover, some doubt is cast upon his real interest in such relief by his declination of another grade GS-11 position offered after he became aware of the error in the pay of the Class II position.

Accordingly, our Claims Division's disallowance of Dr. Killian's claim is sustained.

Dr. Killian has also asked for advice concerning his appeal rights. Decisions of the Comptroller General are binding on executive agencies of the United States. Samuel Freiberg, B-195646, December 27, 1979, 59 Comp. Gen. \_\_\_\_\_. However, independent of the jurisdiction of this Office, the United States Court of Claims and District Courts have jurisdiction to consider certain claims against the Government if suit is filed within 6 years after the claim first accrued. See 28 U.S.C. §§ 1346(a)(2), 1491, 2401, and 2501 (1976).

  
For The Comptroller General  
of the United States